Sentencing Council

ANALYSIS AND RESEARCH BULLETIN

Research into the allocation process and decision making

March 2012

Introduction

There are three main types of offence in England and Wales; offences that can only be tried at a magistrates' court – 'summary' offences; offences that can only be tried at the Crown Court – 'indictable only' offences; and 'triable either way' offences. 'Triable either way' offences can be tried either at a magistrates' court or the Crown Court. A hearing takes place at a magistrates' court to determine the most suitable venue for trial in these cases – the 'allocation hearing'. If an offence is likely to attract a sentence of six months custody or below, it should be heard in a magistrates' court, otherwise it should be committed for trial at the Crown Court. It is important to achieve a consistent approach to the 'allocation decision' and hence the need for some research into this area in general.

Research on the allocation/mode of trial process has been undertaken with magistrates,[1] district judges,[2] and legal advisors.[3] A draft guideline on allocation was issued by the Sentencing Council for consultation from 15 September 2011 to 8 December 2011.[4] Research was conducted within this period to explore the potential impact of the draft guideline on practitioner behaviour and to gain a greater understanding of current practice around making allocation decisions.[5] The guideline on allocation covers adults only and therefore the research and this report relates to this group only. For ease, only the term 'allocation' will be used for the remainder of the report however the author recognises that practitioners may use different terminology for this process.

Background

At present, there are no statutory guidelines regarding the allocation process. However there are guidelines on allocation in the Consolidated Criminal Practice Direction (CCPD)[6] and also reference to allocation in the introduction to the

1 *'Magistrates are trained, unpaid members of their local community, who work part-time and deal with less serious criminal cases… .all magistrates must undertake a compulsory programme of practical training… '* For more detail refer to: http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/judicial+roles/magistrates

2 District judges (magistrates' courts) are full-time members of the judiciary who hear cases in magistrates' courts. They usually deal with the longer and more complex matters coming before magistrates' courts. For more detail refer to: http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/judicial+roles/judges/district-judge-role

3 Legal advisors in magistrates' courts provide neutral advice to the judiciary on points of law in open court.

4 The allocation guideline formed part of an overarching guideline that also covered offences taken into consideration and totality. The consultation document can be found here: http://sentencingcouncil.judiciary.gov.uk/docs/Consultation_-_Allocation_TICs_and_Totality_web.pdf

5 This report should be taken into consideration alongside proposed changes in the Legal Aid, Sentencing and Punishment of Offenders Bill.

6 See 'Part V Further Directions applying in the Magistrates' Courts' 51.1-51.3 for guidance on 'Mode of trial': http://www.justice.gov.uk/courts/procedure-rules/criminal/practice-direction/part5#id6205904

Magistrates' Court Sentencing Guidelines. Under the CCPD guidance,[7] the allocation decision is predominantly based on an assessment of the likely sentence the defendant will receive, taking into account the facts of the case and the arguments put forward by the prosecution and defence in their representations. Relevant sentencing guidelines for the offence under consideration should also be considered at this stage. The CCPD stipulates that allocation decisions should be based on 'the prosecution case at its highest'. This means that magistrates and district judges should assume that the prosecution version of the facts is correct and use this as a key factor in determining the likely sentence and therefore the most suitable venue for the trial.

After the court has made its decisions about venue, the defendant can also choose (or 'elect') trial at the Crown Court even if magistrates or a district judge believe the trial is suitable to be heard in a magistrates' court. If a case is kept for trial at a magistrates' court and the defendant is convicted, the case can be sent at that stage to the Crown Court for sentence if the magistrates' court decides that the defendant merits a sentence outside of magistrates' powers.

The Coroners and Justice Act 2009 included provisions requiring the Sentencing Council to produce 'allocation guidelines',[8] and in s.122 defines these as *"guidelines relating to decisions by a magistrates' court under section19 of the Magistrates' Courts Act 1980 (c.43), or the Crown Court under paragraph 7(7) or 8(2)(d) of Schedule 3 to the Crime and Disorder Act 1998 (c.37), as to whether an offence is more suitable for summary trial or trial on indictment."*[9]

The available data for 2010 show that a minimum of 35 per cent of the cases discharged by the Crown Court fell within the sentencing powers of the magistrates' court.[10] However, it should be noted that these data are not of themselves an indicator that the case ought to have been dealt with in the magistrates' court as there are a range of factors that influence the allocation decision.

Although the data do not necessarily indicate that cases are being committed for trial at the Crown Court inappropriately, it was felt that further information on judicial decision making was required in order to obtain a more informed view on this matter and to contribute to devising statutory guidance on the allocation process.

The draft allocation guideline that was released for professional consultation, and used as part of this research, advocated a more balanced approach to consideration of prosecution and defence representations at the allocation stage. It explains that *"the court should assess the likely sentence in the light of the facts alleged by the prosecution case, taking into account all aspects of the case including those advanced by the defence" (page 27)*; constituting a move away from taking the 'prosecution case at its highest' when compared to existing guidance in the CCPD. The guidance also contained a reminder of the requirement placed upon a court which decides that a case is suitable for trial at the magistrates' court,

7 This summarises and adds to the requirements in Section 19 of the Magistrates' Court Act 1980.

8 The Sentencing Guidelines Council (the Sentencing Council's predecessor) issued draft allocation guidelines in February 2006, but these were contingent on various changes introduced by the Criminal Justice Act 2003 coming into force, which to date have not been commenced. Therefore definitive allocation guidelines were never issued.

9 http://www.legislation.gov.uk/ukpga/2009/25/section/122

10 Figures taken from the Court Proceedings Database, Ministry of Justice, 2010

to explain to the defendant that in the event of conviction, all sentencing options remain open, including committal to the Crown Court for sentence (in lay terms, sending a case to the Crown Court for sentence). The draft allocation guideline can be found at Appendix A.

Methodology

A semi-structured interview approach was used in order to ensure that similar issues were explored with each participant, whilst also allowing for some flexibility in the topics covered. A topic guide was devised and included questions on the following areas:

- key factors influencing allocation decisions/advice under current practice;
- types of offences typically committed for trial at the Crown Court;
- current practice around committing for sentence at the Crown Court;
- the potential impact of the guideline on practice; and
- general views and feedback on the guideline.

Offence scenarios were used to explore current practice and likely practice using the draft guideline for three offences:

- social security - failure to notify change of circumstances;[11]
- actual bodily harm (ABH);[12] and
- possession with intent to supply a Class B drug.[13]

Full details of the scenarios can be found in Appendix B.

Each participant was asked to indicate their likely allocation decision (magistrates and district judges) or advice (legal advisors) using the details presented in two offence scenarios - with reference to sentencing guidance if needed.[14] The three scenarios were rotated so as to alter the order in which participants received them and to ensure that all were used with and without representations.[15] For the first scenario participants were asked to consider their decision under current practice with only the facts of the case, and then afterwards considering the facts and the details of representations from both the defence and prosecution. They were then asked to consider how they would make the allocation decision when using the guideline and taking into account the representations. For the second offence scenario, participants were asked to consider the case with details of representations, using current practice and then under the guideline.

11 Section 111A (1B) Social Security Administration Act 1992

12 Section 47 Offences against the Person Act 1861

13 Misuse of Drugs Act 1971

14 The question was phrased as follows: *"What decision would you make (or for legal advisors: what advice would you give) in relation to keeping the case in the magistrates' court or committing it to the Crown Court? Please make your decision on the basis of the details you are given here."*

15 This was necessary as only the first scenario selected for each participant was used both with and without details of representations and each participant was presented with two scenarios each rather than all three.

Interviews were conducted with 23 participants across five geographical areas: Wales, London, the Midlands, the North East, and the South East. Magistrates and district judges were selected from a panel of research volunteers held by the Sentencing Council and approached to take part. Legal advisors were approached through Regional Legal Advisor Resource Committees. Interviews took place with 13 magistrates, six legal advisors and four district judges. Participants had between approximately two and 31 years' experience in their respective roles.

The interviews were conducted by members of the Analysis and Research Team at the Office of the Sentencing Council. Interviews were recorded with the permission of the participant and written notes taken. Interviews were written up (with reference to recordings where needed) and summarised in Excel for ease of analysis. Analysis was conducted in order to identify key themes and issues mentioned by participants.

Limitations

Findings from the interviews should be treated with care due to the sampling method used. Members of the research panel were either self-selecting or nominated for the research. There is a possibility that those who self-selected into the panel may be more 'engaged' with such an exercise and those who were nominated less engaged. Findings should also be treated with caution due to the small sample size used, particularly when broken down between participants' respective roles.

Responses in relation to questions on the offence scenarios should also be treated with caution as they are only relevant to those scenarios and may differ if details of the scenarios were to change. The views and findings reported here represent those involved in the research only and therefore may not reflect findings or statistics from other sources on this or related topics. Also, participants should not be considered to represent a full range of experience amongst these groups and the findings do not purport to represent all magistrates, district judges and legal advisors in England and Wales.

Key findings

Key factors when making current allocation decisions

Under current practice, practitioners should refer to the guidance on allocation contained in the CCPD. Decisions relating to the allocation of a case require the court to assume that the prosecution version of the facts is correct. The court should also use the relevant sentencing guidelines to determine the likely sentence.

Participants were asked what the key factors were when they were making (or providing advice on) allocation decisions currently. The factors that were most commonly put forward related to the following areas:

- taking the prosecution case at its highest;
- establishing the likely sentence (after a trial);
- representations made by the prosecution and defence; and
- aggravating and mitigating factors.

The findings below are presented for the group of participants as a whole. Analysis indicated no specific differences in views depending on participants' roles or number of years' experience.

Taking the prosecution case at its highest

Most participants acknowledged the need to consider the prosecution case at its highest – as per current guidance on allocation. Some of these mentioned that they would always follow the prosecution representations or that they would *"rarely"* go against them, even when other factors were taken into consideration. Some others however described an approach where the prosecution case at its highest was considered alongside other elements including; defence representations, the likely sentence, magistrates' sentencing powers, the established facts of the case and aggravating and mitigating factors. They described a more holistic approach where all factors were considered rather than automatically following the prosecution at its highest. This (along with some of the factors discussed below) led some participants to comment that they already followed the approach advocated in the consultation guideline.

Establishing the likely sentence (after a trial)

Most participants also agreed that establishing the likely sentence (after a trial) was key in relation to allocation decisions. This was often linked closely to considering the prosecution case at its highest (explained above); for some, even if they considered it in this way, they would also consider a range of other factors to arrive at a more balanced view of the likely sentence.

Once the likely sentence had been determined, participants frequently described assessing whether this was within or outside of magistrates' sentencing powers which in turn would provide an indication of where the trial should take place.[16] Sentencing guidelines[17] were described by many as an important element contributing to agreement on the likely sentence as they would determine the range of sentence the defendant was likely to receive:

> *We look at the sentencing guideline if there is one; [the] key [thing] is, whether if convicted on the prosecution case, the magistrates can give [a long] enough [custodial] sentence.* (legal advisor)

Magistrates typically agreed that legal advisors were key in providing advice in relation to relevant sentencing guidelines and also case law and Court of Appeal guidelines if a case was 'borderline'; in other words the likely sentence could potentially be awarded in the magistrates' or Crown Court. Legal advisors would also be consulted (or would offer advice) when a case was more complicated (for example if there was evidence that required further clarification) or contentious. Several magistrates mentioned they would ask for advice from a legal advisor if they were unsure of the decision before them.

Prosecution and defence representations

The majority of participants agreed that defence representations were made infrequently or rarely and some participants also mentioned that when they were made, they were not particularly detailed. Some commented that the defence *"don't say much"* or that they say they have *"no observations"*.

Representations from the prosecution and defence (where made) were widely recognised as important factors that should be taken into consideration when making a decision in relation to allocation; however, views on the weight attached to these representations varied. Some participants explained that more weight would be attributed to the prosecution representations due to the need to consider 'the prosecution case at its highest' under current guidance. It was recognised by some however that they were *"not bound"* by the prosecution representations that were made and therefore the allocation decision was not always in line with 'the prosecution case at its highest'. Examples of when this might happen were if the bench disagreed with how the offence circumstances were being presented or if they were of the opinion that a sentencing guideline was being wrongly applied (for example if it was thought that the defendant was being placed by the prosecution in the 'wrong' category of a guideline therefore inferring a more or less harsh sentence than warranted).

Many participants confirmed that they would take defence representations into account when made. There was some variation in how these submissions would be considered. One legal advisor explained that they:

> *...look at the prosecution case at its highest and then if there is defence representation this can only bring the sentence down.*

16 For adults, magistrates can sentence up to a maximum of six months custody for a single offence. Any sentence beyond this limit must be awarded by the Crown Court.

17 Sentencing guidelines typically set out starting points and ranges for a sentence depending on the seriousness of the offence, aggravating and mitigating factors.

A magistrate described that they:

> *...would take [defence representations] into account… but they would have to be substantially strong with strong mitigation if I were to vary from the prosecution.*

Several participants did however suggest they would not consider defence representations at all; one magistrate explained that they (magistrates) *"tend not to look at the defence [representations]"* at all due to the need to be careful not to have a trial at this stage.

Several participants suggested that defence representations were more commonly made when the likely sentence was 'borderline', meaning on the threshold between the magistrates' and Crown Court. A few of these participants acknowledged that they would take more notice of defence representations that were made in these circumstances as they may provide information to help make a firm decision on the likely sentence and therefore the suitable venue for trial. There was common agreement that defence representations were unlikely to be made where the defendant was planning to elect trial at the Crown Court or if it was clear from sentencing guidelines that the case should be heard in the Crown Court.

Aggravating and mitigating factors

A mixture of views and practices were mentioned in relation to aggravating and mitigating factors. Aggravating factors were sometimes described as being key in determining the seriousness of the offence and therefore the likely sentence. Some participants afforded greater weight to aggravating factors due to the fact that these were commonly put forward by the prosecution and the need to consider the 'prosecution case at its highest'.

Some participants mentioned that mitigating factors could also in turn assist in determining the seriousness of an offence (however this was not a common view). Some participants said that mitigation was not generally considered at this stage in the process – largely due to emphasis placed on the prosecution case, the rarity of defence representations and their limited nature. One magistrate explained that mitigation rarely formed part of defence representations as the defence would not want to imply guilt at this stage in putting forward mitigation.

Views on the current allocation process and decision making

General views on the allocation process were explored throughout the interviews. There was no particular agreement as to whether allocation decisions were easy or difficult and there did not seem to be a clear link between the nature of views and whether participants expressing these views were legal advisors, magistrates or district judges. Opinions did not seem to vary depending on participants' number of years experience either.

Several participants described allocation decisions as being *"difficult"* or *"not very easy"*. Reasons provided for this included:

- the full facts of the case not being available at this early stage in the process (as generally the allocation decision is made at the first court appearance);
- uncertainty surrounding borderline cases where there are facts present that may subsequently push or pull the sentence above or into magistrates' sentencing powers; and
- the need to refer to sentencing guidance and case law for the more *"unusual cases"*.

Examples of the latter included fraud and possession of cannabis (as practitioners would need to refer to case law). It should be borne in mind however that different areas will be used to dealing with certain types of cases and therefore other courts may specify different types of cases as being more 'unusual' or infrequent.[18]

Others described allocation decisions as *"easy"* or *"straightforward"*. One magistrate commented that it was *"reasonably easy"* and that most decisions were *"straightforward"*. One district judge commented:

> *Making mode of trial decisions is fairly easy as I just look to see if the likely sentence warrants more than six months.*

More serious offence types were cited by some as being easier in terms of allocation decisions as it would be more clear cut to establish that the likely sentence would be outside of the magistrates' court sentencing powers and therefore that the case was suitable for trial at the Crown Court.

Other comments were made in relation to the allocation decision overall; a few participants highlighted the fact that defendants can 'self-elect' trial at the Crown Court and that this option was used quite a lot (meaning that the allocation process itself would make no difference in these cases).[19]

One magistrate voiced their frustration with the process due to a feeling that magistrates' *"hands are tied"* as they have to base the allocation decision on the 'prosecution case at its highest'. They explained that they therefore felt that they did not have the right to be more *"inquisitorial"* in relation to the arguments put forward by the prosecution and that the allocation process felt like a fait accompli.

Offence types likely to be committed for trial at the Crown Court

Participants were asked what types of offence were more likely to be committed to the Crown Court for trial. Most agreed that the more serious cases amongst drugs and violent offences would be heard at the Crown Court, along with almost all sexual offences. Several people also noted that domestic burglary was likely to be heard at the Crown Court.

18 The views and findings reported here represent those involved in the research only and therefore may not reflect findings or statistics on the prevalence of different types of offence from other sources.

19 Ministry of Justice data for 2009/2010 suggest that approximately 10 per cent of defendants elected for trial at the Crown Court. See Criminal Justice Statistics Quarterly Update to June 2011:http://www.justice.gov.uk/downloads/statistics/criminal-justice-stats/criminal-stats-quarterly-june11.pdf

Fraud and serious breach of trust cases and serious public disorder were also mentioned.[20] A few participants also explained that some offence types may have higher or lower profiles in certain courts and therefore be seen by different sentencers as more or less serious. This would typically be a reflection of the types and seriousness of cases that the court was used to dealing with. However a few participants did mention that there were no specific types of case that would always be committed to the Crown Court as each case was *"assessed based on [the] guidance given"*.

Borderline cases

A few participants described that some magistrates exercised caution when making allocation decisions with borderline cases. This was largely related to caution around not sending cases to the Crown Court unnecessarily as they may attract a sentence within magistrates' powers.

One legal advisor explained that there was an issue relating to defendants' expectations around the likely sentence if a trial was heard at a magistrates' court as this could indicate to a defendant that they would receive a sentence of six months or less.

Committal for sentence at the Crown Court

Participants were of the general view that cases were rarely heard in the magistrates' court and then *"sent up"* to the Crown Court for sentencing.[21] Several magistrates stated that they had never done this. This could mean that some cases are committed for trial at the Crown Court too early. One magistrate commented that:

> *..not enough [cases] are held back [in the magistrates' court] and then committed for sentence if need be.*

Another magistrate described a lack of confidence in keeping cases for trial if it was thought that it could receive a sentence outside of their powers. If the case subsequently needed to be committed to the Crown Court for sentencing, they described feeling as if the wrong (allocation) decision had been made. They described wanting:

> *...to make the right decision first rather than fall back on this [committing for sentence] later on.*

Alternatively, the perceived rarity of committing cases for sentence to the Crown Court could mean that magistrates and district judges are making correct decisions to keep a case for trial at the magistrates' court.

Legal advisors and magistrates agreed that in the circumstances when a case was committed to the Crown Court for sentencing, this was generally linked to more information coming to light during the trial (typically relating to previous convictions but also other evidence coming to light about the offence such as hospital reports and photographs) which then made the offence more serious and therefore warranting a harsher sentence.

20 It is possible that the social context at the time of the interviews may have influenced responses to some degree – such as the mention of serious public order at a time when courts were dealing with a higher number of such cases following the riots in August 2011.

21 This would happen if a sentence in excess of six months custody was called for. Ministry of Justice statistics show that committals after a trial in a magistrates' court to the Crown Court for sentencing (including cases where there was a guilty plea) actually form a reasonable proportion of the Crown Court caseload. There were 21,200 committals for sentence made in the 12 months ending September 2011; constituting 17 per cent of all defendants committed for trial or sentencing in this period. See Table Q3a of *'Criminal Justice Statistics in England and Wales'* quarterly statistical bulletin: http://www.justice.gov.uk/downloads/publications/statistics-and-data/criminal-justice-stats/court-proceedings-0911.xls

Potential impact of the draft guideline on practice

Views on the draft guideline and its potential impact on practice were collected through a direct question on this and the use of offence specific scenarios. Offence scenarios were used to explore current practice and likely practice using the draft guideline.

The three scenarios that were used covered the following offences:

- social security - failure to notify change of circumstances;
- actual bodily harm (ABH); and
- possession with intent to supply a Class B drug.

Full details of the scenarios can be found in Appendix B.

Participants were asked to indicate their likely allocation decision (magistrates and district judges) or advice (legal advisors) using the details presented in two offence scenarios. They were asked to consider their decision under current practice with a first scenario where only the facts of the case were provided, and then afterwards considering the facts alongside representations from the defence and prosecution. They were then asked to consider their allocation decision for the scenario using the guideline. For the second offence scenario, participants were asked to consider the case with details of representations, firstly using current practice and then under the guideline. The three scenarios were used in rotation so as to alter the order in which participants received them and to ensure that all were tested.

Offence scenarios

When allocation decisions based on the facts of the case alone were compared with decisions based on facts and representations from both parties, participants rarely changed their allocation decision or advice. Reasons reported for the lack of change varied to some degree depending on the scenario but included views that the representations added nothing new and that the participant did not agree with the prosecution argument (or how they had used a guideline).

The few that did change their minds either did so in order to follow the prosecution case at its highest, or were swayed either by the prosecution or the defence argument or evidence.

Allocation decisions were compared for the scenarios with details of representations under current practice and then when using the draft guideline.[22] This showed that decisions to either accept jurisdiction (when the case is kept in the magistrates' court) or commit a case for trial to the Crown Court did not generally change. The decisions are shown in tables 1 to 3 below. Each table shows the number of respondents that said they would keep the case at the magistrates' court and the number that said they would send the case for trial at the Crown Court, under current practice and then

22 The decisions based on the facts of the case alone have not been included here as there was little difference from decisions under current practice with representations.

under the draft guideline:

Table 1, social security scenario - allocation decision by number of participants (N=16)

	Current practice	Draft guideline
Magistrates' court	12	13
Crown Court	4	3

Table 2, ABH scenario - allocation decision by number of participants (N=14)

	Current practice	Draft guideline
Magistrates' court	5	6
Crown Court	9	8

Table 3, drugs scenario - allocation decision by number of participants (N=16)

	Current practice	Draft guideline
Magistrates' court	15	15
Crown Court	1	1

From analysis of the individual interviews (as per tables 1 to 3 above), it was found that it was rare for participants to change their allocation decision when using the draft guideline – in the drugs scenario there was no change in decision sbetween current practice and when using the draft guideline. Just one person changed their decision for the other two scenarios (this was not the same person for both however). The one decision that changed when considering the social security scenario involved keeping jurisdiction when using the draft guideline due to the impact of considering both sets of representations on the likely sentence. The participant explained that if the defence representations were factual, this would sway them to keep the case. In the ABH scenario, the decision also changed to keep the case at the magistrates' court when using the draft guideline but this was due to greater consideration being afforded to the possibility of committing the case for sentencing at the Crown Court if this was needed.

Most participants explained that the way they arrived at their decision or advice in relation to allocation had not changed from current practice largely because they felt they were already adopting a similar process. As already outlined on page five, most participants described currently taking the prosecution case at its highest; many also described that arriving at the likely sentence was also key to making the allocation decision. Some however explained that they were not receptive to the approach advocated in the proposed guideline.[23]

23 The methodology that was used for the research may also have had a potential impact on the responses received. Participants were asked to use the draft guideline for the offence scenarios, many of which had not had sight of it before. Understanding or interpretation of the guideline may therefore have varied.

Views on the potential impact of the draft guideline on practice

When asked specifically if participants thought the consultation guideline would affect practice in relation to making allocation decisions, views were fairly balanced between those that thought the guideline would or may have an impact on practice and those that thought it would not.

Those that thought practice would not change (or would probably not) mentioned several different areas of practice as described below.

- As with consideration of the offence scenarios, some participants were of the view that the practice advocated by the consultation guideline was very similar to current practice and would therefore lead to little or no change. These participants reported that they generally requested defence representations under current practice or were already taking a balanced view of defence and prosecution representations when made.

- A further view was put forward by some for anticipating no change in the frequency of requesting defence representations. This was explained by some as being due to the infrequent nature of these being made under current practice despite the defence being aware that they have the option to present these:

  ...they often say they have no comment rather than argue something. (magistrate)

Some participants were unsure as to whether the guideline would lead to more cases being kept for trial at the magistrates' court and some voiced concerns in relation to perceived encouragement under the draft guideline to do so. It was felt that if this encouragement led to more cases being committed to the Crown Court for sentencing, it could potentially lead to criticism of the original allocation decision and go against the expectations given to the defendant of a lesser sentence as the trial was taking place at the magistrates' court. This was also reflected in participants' comments in relation to committal for sentence under current practice which is covered earlier in the report.

Of those who thought practice would or may change, this was typically mentioned in relation to three areas.

- The way that defence representations would be considered under the guideline. Several participants mentioned that they would consider representations differently by considering the likely sentence in the light of all aspects of the case:

  It will make magistrates feel like they've got a balanced consideration about mode of trial decisions.(magistrate)

  Some commented that there would be a move away from taking the 'prosecution case at its highest'.

- Some thought that the draft guideline could also result in more defence representations being made (some reported that these were not often made under current practice):

  I'm sure that with those guidelines, the defence solicitors will be putting their case fairly strongly now.(magistrate)

  [The guideline] spells out the duty to consider these. (district judge)

- More borderline cases may be kept for trial at the magistrates' court due to the encouragement to use the power to

commit a case for sentencing at the Crown Court following conviction in the magistrates' court. One participant explained that the new guideline would not *"tie [their] hands"* (as they felt under current practice) in relation to doing so. It was explained by some that the guideline would allow greater clarity on this issue due to outlining explicitly that those accused should be reminded that all sentencing options remain open even if jurisdiction is accepted. Under current practice some mentioned concerns over sending a case for sentencing at the Crown Court as this could go against the expectations given to the defendant by holding the trial at the magistrates' court.

Several participants explained that any change in practice would be dependent on training provided to magistrates and getting legal advisors *"on board"*. One participant queried whether any training would be offered in relation to the guideline and questioned whether it would often be referred to if people were not aware of the changes.

Some participants expressed concern over the potential impact of the guideline. Concerns largely related to the need to take both prosecution and defence representations into account at the allocation stage, rather than only considering prosecution representations. The amount of detail to be considered when weighing up prosecution and defence representations was an issue for some who questioned whether a *"mini-trial"* would need to take place:

What do we do without having a trial? (magistrate)

Specific concerns were expressed about the defence being able to argue against the facts being presented by the prosecution and as to how magistrates would reach a 'balanced view' of the representations made. It was also thought that the process could take longer as a result of considering defence representations and that there would possibly be an increase in the number of these being made.

Some thought, however, that the guideline could result in more cases being heard at the magistrates' court and that these trials would therefore be cheaper and quicker than if they had been committed for trial at the Crown Court. This also tied in with time saving, which was mentioned by a few participants, due to the more *"structured process"*.

Is practice likely to change?

The research has shown that different responses varied in relation to the likely impact of the draft guideline on practice.

- Some reported being unlikely to change current practice. For some of these respondents, this related to the fact that they already reported following the approach advocated in the draft guideline. Many in this group reported taking a balanced approach to determining the likely sentence. This was demonstrated for some respondents by examples provided in relation to the offence scenarios, as well as the degree of flexibility used from case to case.

- The lack of change between the decisions suggested for scenarios with and without representations also supports this view as it provides an indication that some participants may currently form allocation decisions based predominantly on the likely sentence.

- Others were more reluctant to adopt the suggested approach. This was due to a lack of support for the changes advocated in the draft guideline – largely reticence to afford more weight to defence representations and also to keep more cases for trial at the magistrates' court.

- Another group of participants reported being more likely to change their behaviour in relation to allocation as they were not following an approach similar to the draft guideline currently. They described being amenable to changing the way they made decisions. However some also mentioned concerns relating to the need for training on the guideline or to the support that may be provided if more cases were kept for trial at the magistrates' court.

Consistency

When asked specifically if the guideline would improve consistency in terms of the approach used to make allocation decisions, answers were generally tentative with a number of participants saying that it *"should do"* or that they hoped it would. Others did not think it would as the process was close to the one used currently or as they currently did not see consistency as a problem:

> *I don't perceive there is too much of a problem in terms of inconsistent decisions and I think the current guidance is fairly well known. If there is inconsistency it's not clear to me this guidance is tight enough or prescriptive enough to improve upon that consistency in anything like the same way that offence specific guidelines are able to do.* (legal advisor)

Those that did think it would encourage consistency of approach mentioned that it was the clarity of the approach that would help this – having a *"consistent starting point"* and a *"more defined approach"*.

Several suggested that consistency could be reduced under the new guideline as it would add more complexity or uncertainty to the allocation process due to the need to consider both prosecution and defence representations:

> *It probably won't add consistency because as soon as you add something to the mix, in terms of aggravation or mitigation, it becomes more difficult.* (magistrate)
>
> *The new guideline might add uncertainty and therefore lead to less consistency.* (district judge)

There was concern about how the court would resolve factual disputes between the parties.

One participant mentioned that only training could assist in relation to consistency – for all members of the magistrates' bench, so that the process is clearer to all.

How easy was it to use the proposed guideline?

Some participants welcomed the brevity of the guideline and mentioned that it was useful to consolidate guidance on allocation in the form of a single guideline. Several participants advocated the *"structured approach"* – supporting the fact that the guideline gave them a clear *"starting point"* (using guidelines to determine the likely sentence) from which they could then *"work back from"* .

When asked about the use of the guideline, approximately half of the participants mentioned that it was *"clear"*, *"easy to use"*, *"simple"* or *"well structured"*. Several reiterated or mentioned that it was no different from current practice (although one did add *"apart from the way that defence representations are dealt with"*). Comments did point to a few areas where wording could be improved in order to improve clarity however. These will be taken into consideration during the drafting of the definitive guideline.

Conclusion

Participants reported mixed views in relation to the impact that the guideline would have on allocation practice. Some participants reported that their practice would change as they were not following an approach similar to the draft guideline currently. There was however some concern in relation to the balanced approach in considering defence and prosecution representations and also the support that may be provided if more cases were kept for trial at the magistrates' court. Other participants reported that the guideline would not make much difference to how they approached allocation decisions; either as the draft guideline reflected their current practice or as they did not support the changes being put forward.

Therefore it is likely that some people may be reluctant to move away from the current practice of 'taking the prosecution case at its highest' if a similar guideline was taken forward. There may also be a challenge in terms of influencing how sentencers deal with defence representations as these are reported as not being commonly made or if made, not being particularly detailed.

There was some concern over how the guideline would work in practice; particularly in relation to considering prosecution and defence representations and the potential for this to result in a more drawn out process and potentially a *"mini-trial"* at this early stage. The changing context for allocation decisions should also be considered in forming a definitive guideline; other issues that were raised were the changes to Legal Aid, which are likely to result in more defendants being unrepresented, and therefore how the guideline would be used by this group and whether it would be useful to them in the form proposed.

Several participants mentioned that only training (of magistrates) and support or 'buy in' to the process from legal advisors would result in changes to practice and consistency in relation to allocation decision making.

Acknowledgements

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Appendix A, Overarching Guidelines Professional Consultation: Allocation, Offences Taken Into Consideration and Totality , Annex C Draft Allocation Guideline

Draft Allocation guideline

Applicability of guideline

In accordance with section 122(2) of the Coroners and Justice Act 2009, the Sentencing Council issues this draft guideline. When issued as a definitive guideline, it will apply to all defendants in the magistrates' court (including youths jointly charged with adults). It will not be applicable in the youth court where a separate statutory procedure applies.

Section 125(1) Coroners and Justice Act 2009 provides that when sentencing offences after 6 April 2010:

"Every court -

(a) must, in sentencing an offender, follow any sentencing guideline which is relevant to the offender's case, and
(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,

unless the court is satisfied that it would be contrary to the interests of justice to do so."

Statutory framework

In accordance with section 19 of the Magistrates' Courts Act 1980, where a defendant pleads not guilty or has not indicated an intention to plead guilty to an offence triable either way, a magistrates' court must decide whether the offence should be sent to the Crown Court for trial.

When deciding whether an either way offence is more suitable for summary trial or trial on indictment, section 19 of the Magistrates' Courts Act 1980 provides that the court shall give the prosecutor and the accused the opportunity to make representations as to which court is more suitable for the conduct of the trial[38].

The court must also have regard to:

a) the nature of the case;
b) whether the circumstances make the offence one of a serious character;
c) whether the punishment which a magistrates' court would have power to inflict for the offence would be adequate; and,
d) any other circumstances which appear to the court to make the offence more suitable for it to be tried in one way rather than the other[39].

[38] Section 19 (2) Magistrates' Court Act 1980
[39] Section 19 (1) and (3) Magistrates' Court Act 1980

Guidance

It is important to ensure that all cases are tried at the appropriate level. In general, either way offences should be tried summarily unless it is likely that the court's sentencing powers will be insufficient. Its powers will generally be insufficient if the outcome is likely to result in a sentence in excess of six months for a single offence.

The court should assess the likely sentence in the light of the facts alleged by the prosecution case, taking into account all aspects of the case including those advanced by the defence.

The court should refer to definitive guidelines to assess the likely sentence for the offence.

Committal for sentence

There is ordinarily no statutory restriction on committing an either way case for sentence following conviction. The general power of the magistrates' court to commit to the Crown Court for sentence after a finding that a case is suitable for summary trial and/or conviction continues to be available where the court is of the opinion that the offence (and any associated offences) is so serious that greater punishment should be inflicted than the court has power to impose.[41] Where the Court decides that the case is suitable to be dealt with in the magistrates' court (also known as accepting jurisdiction), it should remind the offender that all sentencing options remain open, including committal to the Crown Court for sentence at the time it informs the offender of this decision.

However, where the court proceeds to the summary trial of certain offences relating to criminal damage, upon conviction there is no power to commit to Crown Court for sentence.[42]

Linked cases

Where a youth and an adult are jointly charged, the youth must be tried summarily unless the court considers it is in the interests of justice for both the youth and the adult to be committed to the Crown Court for trial. Examples of factors that should be considered when deciding whether to separate the youth and adult defendants include:

- whether separate trials can take place without causing undue inconvenience to witnesses or injustice to the case as a whole;
- the young age of the defendant, particularly where the age gap between the adult and youth offender is substantial;
- the immaturity of the youth;
- the relative culpability of the youth compared with the adult and whether or not the role played by the youth was minor;
- lack of previous convictions on the part of the youth.

[41] Section 3 Powers of Criminal Courts (Sentencing) Act 2000
[42] Schedule 2 and section 33 Magistrates' Courts Act 1980

Appendix B, Offence scenarios

Case Study 1. Section 111A (1B) Social Security Act (failure to notify change of circumstances)

Violet separated from her husband in 2007 when her children were aged three and five. She is the sole carer for those children. She began claiming income support at this time when she was looking after her children full time and continues to receive £250 per week. She obtained a cleaning job in September 2009 but did not declare this to the Benefits Agency. Had she done so, her entitlement to income support would have ceased. The amount of the overpayment is £26,000.

Violet gives no indication as to plea.

Prosecution representations

The prosecution submit that this case is not suitable for summary trial. The prosecution say it is an offence of a serious character – she has deliberately continued her claim knowing that she was not entitled to do so resulting in her obtaining a considerable benefit of £26,000. We submit that this is a high value [as set out in the CCPD – high value is defined as a figure equal to at least twice the amount of the £5,000 limit imposed by statute on a magistrates' court when making a compensation order].

We refer you to the MCSG for benefit fraud [at page 62d of MCSG] – we submit that this court's powers would not be sufficient to deal with the seriousness of this case.

We suggest that the activity falls within box three:
'not fraudulent from the outset and carried out over a significant period of time' – since September 2009.

We refer you to the starting point of six weeks' custody for an offence involving £12,500. The guideline goes on to give a range where the value is between £5,000 and £20,000 of a medium level community order to 26 weeks custody. This case involves an amount in excess of the figure at the top of that range and on this basis the court's sentencing powers would be insufficient.

Defence representations

The defence submit that the case is suitable for summary trial. Whilst accepting that the offence is of a serious character, we do not accept that it is so serious that a sentence in excess of six months' custody is likely to be imposed if the defendant were to be convicted.

We would also refer you to the MCSG and point out that there are a number of starting points set out in box three. We ask you to consider the line below the one the prosecutor has referred you to. That has a starting point of Crown Court for a value of £60,000 but the range for a value of between £20,000 and £100,000 is 12 weeks custody to Crown Court.

We would submit that £26,000 is not so significantly above the bottom of the range (12 weeks for £20,000) that this court could not sentence this case.

Case Study 2. Section 47 Actual Bodily Harm (ABH)

D is on a night out with three friends in a snooker hall. One of his friends gets involved in a verbal altercation with a male, B, at the next snooker table who is also with friends.

A fight breaks out and D hits B over the head with a snooker cue causing a cut requiring two stitches. D also headbutts B in the face twice before D is pulled away. B suffers a cut under his left eye which requires two stitches and 2 of his front teeth are broken.

D indicates a plea of not guilty.

Prosecution representations

On the basis of the Sentencing Council guideline for ABH [see page 201] and the facts of this case, the prosecution submit that this is a category two offence. We submit that whilst it is on the borders of requiring trial in the Crown Court, looked at overall, it should remain in the magistrates' court. The starting point is 26 weeks' custody.

We say it is category two for the following reasons:
- there is greater harm because the injuries are serious in the context of an ABH and there is a repeated assault on the same victim;
- there is no factor indicating lesser harm;
- there are no factors indicating higher culpability;
- we accept that the court could find there was a relative lack of premeditation which is a factor indicating lower culpability.

On that basis we submit that the court is unlikely to move from the starting point of 26 weeks' custody which is within this court's powers of sentence.

Defence representations

The defence disagree with the prosecution and submit that this case is not suitable for summary trial. Whilst we accept the Crown's contention that the case is category two for the purposes of sentencing, that is not the only matter the court should consider in deciding the appropriate venue. The court should also consider whether the case involves complex questions of fact or difficult questions of law. In this case, there are issues around the identification of the defendant – there is no forensic evidence connecting him to the assault; no identification parade was held with any of the prosecution witnesses. He was identified by the complainant, who accepts he was drunk at the time of the assault, some 30 minutes after the assault whilst the complainant was being treated by ambulance crew at the scene. These are issues best aired before a jury at the Crown Court.

Case Study 3. Drugs – possession with intent to supply Class B

Police stop a vehicle driven by D at 9.30pm and notice a smell of cannabis. Following a search of the vehicle officers recovered a sunglasses pouch containing four snap bags of skunk cannabis with a street value of £80. They also find £375 in his jeans. D tells the police that he is a heavy user of cannabis. He sometimes sells cannabis to his friends in order to fund his own heavy cannabis use.

D makes no indication as to plea.

Prosecution representations

The prosecution submit this case is not suitable for summary trial – the amount of money found on the defendant (£375) is a large amount of cash for someone who is not working and who, by his own admission, is a heavy user of cannabis. This is supported by his admission to police that he sells cannabis to friends - the amount of cash would suggest that this is regular supply.

We refer you to the MCSG p 53 (possession with intent to supply Class B) and submit that this falls within level three:
'any other supply, including small scale supply in prison – whether by prisoner or another' which has a starting point of 'Crown Court.'

We therefore submit that your sentencing powers are insufficient and the matter should be committed to the Crown Court for trial.

Defence representations

We submit that this court would have sufficient sentencing powers if they retained jurisdiction in this case. We disagree that this is a level 3 case and suggest that it is in fact level 2:
'small scale retail supply to consumer'.

This has a starting point of 6 weeks' custody with a range of medium level community order to 26 weeks' custody.

The prosecution have been unable to produce any evidence before you today that it was anything other than small scale dealing – the defendant has been honest in admitting to officers that he 'sometimes' sells cannabis to help support his own habit but this is small scale. The amount of cash found on the defendant is not inconsistent with this. The defendant has given instructions as to how he came to be in possession of that cash, which is nothing to do with 'drug dealing' and will give that explanation to the court in due course.

If convicted, we submit that this court's sentencing powers with a maximum of 26 weeks' custody available, would be ample to mark the seriousness of this offending.

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